

AFFIN BANK BHD

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v.

TAN SRI KISHU TIRATHRAI (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[COMMERCIAL DIVISION NO: D4-22-524-2001]
11 JULY 2004

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CIVIL PROCEDURE: *Execution - Stay - Writ of seizure and sale - Whether there were special circumstances - Whether an abuse of process of court - Whether summary judgment obtained by judgment creditor valid and enforceable - Whether judgment creditor entitled to pursue any or all remedies to recover monies - Whether judgment debtor unable to pay judgment debt*

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This was an appeal (encl. 32) by the judgment debtor ('defendant') against the decision of the deputy registrar dismissing his application in encl. 29 for: (i) the writ of seizure and sale dated 22 December 2003 to be stayed absolutely pursuant to O. 47 r. 1 of the Rules of the High Court 1980 ('the RHC'); or (ii) alternatively, the writ of seizure and sale to be struck out pursuant to the inherent jurisdiction of the court under O. 92 r. 4 of the RHC. The judgment creditor ('plaintiff') had obtained summary judgment against the defendant on 19 February 2002 and averred that the writ of seizure and sale was an effective way for the plaintiff to reap the fruits of the summary judgment since the defendant had, time and again, thwarted the plaintiff's attempts to enforce the summary judgment with no intention to settle the debt. The defendant, however, contended that there were special circumstances which rendered it inexpedient to enforce the summary judgment, they being: (a) that the summary judgment was a nullity; and (b) that the writ of seizure and sale was *mala fide* and an abuse of the process of the court.

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Held (dismissing the appeal):

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[1] On the facts, it was apparent that encl. 32 represented the defendant's fifth attempt to prevent the plaintiff from executing the summary judgment; these repeated attempts by the defendant were a clear abuse of the process of the court and this court was entitled to exercise its inherent powers under O. 92 r. 4 of the RHC to strike out encl. 32 forthwith. Furthermore, there were no special circumstances relating to the enforcement of the summary judgment that justified the grant of a stay of execution of the writ of seizure and sale. The plaintiff, as the judgment creditor, was entitled to

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- a** pursue any or all the remedies to recover monies lent by it; thus, the plaintiff was entitled to pursue with the execution of the summary judgment against the defendant under the writ of seizure and sale as well as under the bankruptcy proceedings. The summary judgment was a valid and enforceable judgment; to say that the summary judgment was a nullity as
- b** the base lending rate ('BLR') had not been stated overlooked the fact that the BLR cannot be fixed and that it fluctuates on a regular basis. In regard to the defendant's averment that he was unable to pay, the defendant had failed to exhibit any evidence to substantiate such a claim and had merely made bare statements in regard to his employment income, liability as a
- c** guarantor and debts to various financial institutions. (pp 157 f-g, 159 d, g, 160 a, 163 f-h & 164 a-b)

Case(s) referred to:

- Aldred v. Constable* [1844] 6 QB 370 (*refd*)
Apted v. Apted and Bliss [1930] P 246 (*refd*)
- d** *Arab Bank Ltd v. Ng Soo Jin & Ors* [1988] 3 MLJ 250 (*refd*)
Biscop v. White [1600] Cro Eliz 759 (*refd*)
Blackman v. Fysh [1892] 3 Ch 209 (*refd*)
Classpoole v. Young [1829] 9 B & C 696 (*refd*)
Cooke v. Birt [1814] 5 Taunt 765 (*refd*)
Gawler v. Chaplin [1848] 2 Exch 503 (*refd*)
- e** *Giles v. Grover* [1832] ICI & Fin 97 (*refd*)
Gobby v. Dewes [1883] 10 Bing 112 (*refd*)
Farulli v. Farulli and Pederzoli [1917] P 28 (*refd*)
Fleet v. Perrins [1868] LR 3 QB 536 (*refd*)
Freeman v. Cox [1878] 8 Ch D 148 (*refd*)
Harper Gilfillan (1980) Sdn Bhd v. Kean Toh Amang Factory Sdn Bhd [1986] 1 MLJ 249 (*refd*)
- f** *Harrington v. Taylor* [1812] 15 East 378 (*refd*)
Higgins v. Sommerland [1614] 2 Bulst 68 (*refd*)
Hutchison v. Birch [1812] 4 Taunt 619 (*refd*)
Kerbey v. Denby [1836] IM & W 336 (*refd*)
Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC (*refd*)
- g** *Lee v. Gansel* [1774] 1 Cowp 1 (*refd*)
Lim Sin Oo & Ors v. Cheah Tjeng Siong [1991] 1 CLJ 726; [1991] 2 CLJ (Rep) 418 HC (*refd*)
Lloyd v. Sandilands [1818] 8 Taunt 250 (*refd*)
- h** *Lord v. Thornton* [1614] 2 Bulst 67 (*refd*)
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC (*refd*)
M'Gregor v. Barrett [1848] 6 CB 262 (*refd*)
Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA (*refd*)
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- Pitcher v. King* [1844] *Dav & Mer* 585 (*refd*) **a**
Pitcher v. Nokes [1848] 12 *JPJo* 473 (*refd*)
R v. Bird [1679] 2 *Show* 87 (*refd*)
R v. Newton [1903] 67 *JP* 453 (*refd*)
Ratcliffe v. Burton [1802] 3 *Bos & P* 223 (*refd*)
Re Banks [1845] 4 *LTOS* 375 (*refd*) **b**
Re Overseas Aviation Engineering (GB) Ltd [1963] *Ch* 24 (*refd*)
Re Peter Wong, ex p Mirandolle Voute & Co Ltd [1958] *MLJ* 116 (*refd*)
Royson's case [1628] *Cro Car* 146 (*refd*)
Semayne's case [1604] 5 *Co Rep* 91 a (*refd*)
Sigma Air Conditioning Sdn Bhd v. World Wide Agencies (M) Sdn Bhd [1980] 1 *MLJ* 179 (*refd*) **c**
Southam v. Smout [1964] 1 *QB* 308 (*refd*)
TC Trustees Ltd & Anor v. JS Darwen (Successors) Ltd [1969] 2 *QB* 295 (*refd*)
Vaughan v. McKenzie [1969] 1 *QB* 557 (*refd*)
Watson v. Murray & Co [1955] 2 *QB* 1 (*refd*)
YK Fung Securities Sdn Bhd v. Ronald Yeoh Kheng Hian [1989] 2 *CLJ* 1284;
[1989] 2 *CLJ (Rep)* 664 *HC* (*refd*) **d**

Legislation referred to:

- Bankruptcy Act 1967, ss. 2, 10(1), (2), 50(1), (2)(b), 53(1), 115
Rules of the High Court 1980, O. 45 rr. 12(1), 13(1), O. 47 r. 1(3), O. 92 r. 4

Bankruptcy Act [Sing], s. 49 **e**
Rules of the Supreme Court [UK], O. 47 r. 1

For the plaintiff - Tharmy Ramalingam (Lim Tai Ching); M/s Shook Lin & Bok
For the defendant - Govin Sreedharan; M/s Choong & Co

Reported by Suresh Nathan **f**

JUDGMENT

Abdul Malik Ishak J:

Summons in chambers in encl. 29 and the appeal thereto in encl. 32 – in relation to the writ of seizure and sale

By way of encl. 29, the defendant judgment debtor by the name of Tan Sri Kishu Tirathrai applies for the following orders: **g**

- (a) that the writ of seizure and sale dated 22 December 2003 be stayed absolutely pursuant to O. 47 r. 1 of the Rules of the High Court 1980 (“RHC”); **h**

(b) alternatively, that the writ of seizure and sale be struck out pursuant to the inherent jurisdiction of the court under O. 92 r. 4 of the RHC;

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- a* (c) that the costs of the application be borne by the plaintiff judgment creditor by the name of Affin Bank Berhad; and
- (d) that such further and or other relief be granted as this Honourable Court deems fit and just in the circumstances.
- b* The writ of seizure and sale is the most common and effective method of enforcement of a money judgment. It is also known to English lawyers and English judges as the writ of *feri facias* or *elegit*. Such a writ is used to enforce a judgment or an order for the payment to the plaintiff of a sum of money or costs. The writ can also be used for the recovery of money as envisaged under O. 45 r. 13(1) of the RHC. It is always prudent to issue the
- c* writ of seizure and sale in the prescribed form (see Form 88 and O. 45 r. 12(1) of the RHC) and it is usually issued in the form of a command to the sheriff to seize the property identified by the execution creditor as that belonging to the execution debtor. The sheriff will act accordingly and, if necessary,
- d* proceed to sell so much of the property as it may be sufficient to satisfy, firstly, the amount of the judgment debt and, secondly, the costs of the execution.
- For the execution debtor, the writ of seizure and sale is a nightmare. This must be the immediate reaction of the present defendant. But the law must take its course.
- e* The sheriff has no choice but to carry out his duty. And the sheriff's duties under the writ of seizure and sale would be:
- (1) in so far as the judgment creditor is concerned, it is to obey the writ and any lawful instructions that have been communicated to him;
- f* (2) in the context of the plight of the judgment debtor, the sheriff is not supposed to do any act that is not authorised by the writ (*Giles v. Grover* [1832] ICI & Fin 97, HL); and
- g* (3) in so far as the court is concerned, it is to make a return to the writ which in essence means that the sheriff must furnish a memorandum itemising the specified information which include, inter alia, the date wherein the writ of seizure and sale was delivered to him, the amount to be levied under the said writ, the minute details of the property seized together with the place or the location of the seizure. The value of such return can never
- h* be questioned. It is said to be conclusive (*Gobby v. Dewes* [1883] 10 Bing 112; and *Re Peter Wong; ex p Mirandolle Voute & Co Ltd* [1958] MLJ 116). According to *Harrington v. Taylor* [1812] 15 East 378 at 383, a return is said to be held in high regard so much so that no averment is permitted to be made against it.
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It is quite obvious that the goods, chattels and other property seized under the writ of seizure and sale must belong to the judgment debtor and not anyone else (*Classpoole v. Young* [1829] 9B & C 696 at 701; *Sigma Air Conditioning Sdn Bhd v. World Wide Agencies (M) Sdn Bhd* [1980] 1 MLJ 179; and *Harper Gilfillan (1980) Sdn Bhd v. Kean Toh Amang Factory Sdn Bhd* [1986] 1 MLJ 249).

So much for the brief insight into the realm of the law. I shall allude to it later.

Enclosure 29 was heard by the deputy registrar and she dismissed it on 16 June 2004. Being aggrieved the defendant filed an appeal to the judge in chambers in encl. 32.

For convenience, I shall hereinafter refer to the plaintiff judgment creditor as the “plaintiff” while the defendant judgment debtor will be referred to as the “defendant”.

Now, the defendant affirms an affidavit in support on 17 May 2004 as seen in encl. 19 and there he admits being the judgment debtor. The defendant too states that the facts deposed to by him, unless otherwise stated to the contrary, are within his own personal knowledge and/or from the documents in his possession. The defendant then refers to the writ of seizure and sale dated 22 December 2003 filed in this court and he states that he affirms the affidavit in encl. 19 without prejudice to his rights to raise any preliminary objections at the hearing of encl. 29. The defendant has been advised by his solicitors and he verily believes that there are special circumstances which render it inexpedient to enforce the summary judgment dated 19 February 2002 and he sets out the special circumstances in this way:

(i) That The Summary Judgment Dated 19 February 2002 (Hereinafter Referred To As The “Summary Judgment”) Is A Nullity

Here, the defendant says that since the summary judgment is for a sum of RM2,538,959.50 as at 31 December 2000 together with interest thereon at the rate of 1.5% above the plaintiff’s base lending rate (hereinafter referred to as the “BLR”) on daily rest to be compounded monthly from 1 January 2001 till full settlement without specifying exactly what is the BLR, the summary judgment is riddled with uncertainty and is accordingly a nullity. The defendant says that he is perplexed as to the amount of interest which he has to pay under the summary judgment in order to avoid enforcement proceedings.

a (ii) That The Writ Of Seizure And Sale Is Mala Fide And An Abuse Of The Process Of Court

b It is stressed and the defendant says that the plaintiff has already commenced bankruptcy proceedings against him (referring to the defendant) to the point that the creditor's petition has already been served on him (referring to the defendant) and it is fixed for hearing on 22 June 2004. This ought, according to the defendant, be sufficient to strip him of all his assets and place them in the hands of the official assignee for distribution to all his creditors, including the judgment creditor – referring, of course, to the plaintiff. Yet, according to the defendant, the plaintiff had nonetheless still deliberately chosen to enforce the summary judgment against him by way of writ of seizure and sale even though it is obviously quite superfluous to do so. According to the defendant, the whole intent and purpose of the writ of seizure and sale is calculated to embarrass him and his innocent family as the plaintiff knows fully well that any auction of the chattels seized pursuant to the writ of seizure and sale will be held at his home and opened to the public thereby subjecting him and his family members to ridicule and contempt especially bearing in mind the defendant's status and standing in Malaysian society. The defendant proceeds to say that the conduct of the plaintiff is even more odious given the fact that the plaintiff fully knows that the proceeds from any public auction of the chattels seized will be negligible in settling the huge amount of the summary judgment sum. Proceeding further, the defendant says that the plaintiff also knows fully well that the defendant has lodged an appeal against the summary judgment to the Court of Appeal *vide* Rayuan Sivil No: W-02-330-2003 and the same is currently pending appeal before the Court of Appeal. The defendant then proceeds further to say, and I quote him as follows:

f The judgment should not be enforced against me as I am unable to pay the judgment sum. As a matter of fact, I have already committed an act of bankruptcy after having failed to comply with the bankruptcy notice served on me by the judgment creditor (referring to the plaintiff) for failing to comply with the judgment (referring to the summary judgment). Presently, my income, the nature and value of my properties and the amount of my liabilities are as indicated in Schedule "A" annexed hereto. A reading of Schedule "A" clearly shows that I am unable to pay the judgment sum.

g For these reasons, the defendant prays for an order in terms of encl. 29 and, in the context of encl. 32, he is asking this court to allow encl. 32 with costs.

h What should I do when the defendant admits that he is unable to pay the judgment sum? What should I do when the defendant admits committing an act of bankruptcy after having failed to comply with the bankruptcy notice that was served on him by the plaintiff for failing to comply with the summary

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judgment? These are indeed pertinent questions to be posed. But the admissions of the defendant have made life easier for me in so far as adjudicating the appeal in encl. 32 is concerned. Admissions of this kind are admissible in evidence and they may be received by the court (*Fleet v. Perrins* [1868] LR 3 QB 536). The court in *Freeman v. Cox* [1878] 8 Ch D 148 was of the view that the failure to dispute an affidavit which showed that the money was in the defendant's hands as executor was treated as an admission by him. That was a case where there was a failure to dispute the evidence contained in the affidavit. Here, before me, the defendant willingly made those admissions. They were and are damning pieces of evidence detrimental to the defendant.

Now, Schedule "A" shows the purported financial standing of the defendant and it makes for interesting reading material. It is ideal to reproduce Schedule "A" and I shall do so now:

Tan Sri Kishu Tirathrai			
I/C No. 410305-01-5273 (2982302)			
1) Annual Employment Income:		RM	300,000.00
2) Personal Loans			
I) Secured Loans			
a) Public Bank Berhad	30.11.2001	RM	12,776,701.30
b) Maybank Bhd	28.02.2003	RM	4,840,745.12
		RM	17,617,446.42
Unsecured Loan & Credit Card			
II) a) Affin Bank Bhd	07.01.2003	RM	2,976,505.76
b) Bumiputra-Commerce Bank Bhd		RM	208,242.96
(Credit Card)		RM	3,184,748.72

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3) Personal Guarantees to Companies			
a) Tirathrai Sdn Bhd			
<i>b</i>	1) United Overseas Bank (Malaysia) Bhd	31.10.2001	RM 14,316,058.96
	2) Public Bank Bhd	12.08.2003	RM 3,370,846.70
	3) Bank of Tokyo Mitsubishi (M) Bhd		RM 2,500,000.00
<i>c</i>	4) Citibank Bhd		RM 10,000,000.00
	5) RHB (Formerly: Bank Utama (Malaysia) Bhd		RM 10,000,000.00
	6) Affin Merchant Bank	30.04.2001	RM 15,507,421.39
<i>d</i>	7) Arab-Malaysian Bank Bhd	31.08.1999	RM 8,794,918.42
	8) EON Bank Bhd	29.05.2003	RM 2,623,926.73
	9) Maybank Bhd (formerly Phileo Allied)		RM 3,000,000.00
<i>e</i>	9) Maybank Bhd (The Pacific Bank)	31.10.2002	RM 5,000,000.00
			75,113,172.20
	b) Tirathrai Holdings Sdn Bhd		
<i>f</i>	1) Affin Bank Bhd		RM 10,000,000.00
	c) Mona Industries Malaysia Sdn Bhd		
	1) HSBC Bank Malaysia Bhd	10.07.2000	RM 26,938,042.18
<i>g</i>	d) Kenyimas Sdn Bhd		
	1) Standard Chartered Bank Bhd	30.04.2001	RM 2,960,886.29
	e) Tirathrai Realty Sdn Bhd	30.04.2001	RM 3,030,907.13
<i>h</i>	1) Standard Chartered Bank Bhd		
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f) Globe Corporation Pte Ltd. Singapore			
Indian Bank, Singapore (S\$15,193,758) Ex Rate: 2.1632	April 2004	RM	32,893,646.62
g) Tirathrai Properties Sdn Bhd			
Danaharta Urus Sdn Bhd	31.03.2003	RM	6,284,142.68
h) Target Yields Sdn Bhd	28.02.2004	RM	3,569,938.00
Danaharta Urus Sdn Bhd			
Total of Personal Guarantee		RM	160,790,735.10
Total of Personal Loans & Personal Guarantee		RM	181,592,930.24
4) Assets			
a) 10, Titiwangsa, Kuala Lumpur (under Lien Caveat for Maybank Loan to Tan Sri Kishu Tirathrai)			5,800,000.00
b) 25% share in Kasipillai Land (60,000 SF)			500,000.00
c) BSN (2,475,000 shares @ RM0.10) Pledged to Public Bank Nominee for Public Bank Loan to Tan Sri Kishu Tirathrai			247,500.00
	Total:	RM	6,547,500.00

The defendant heavily relies on Schedule “A” to show to this court that he is as poor as a church mouse. The defendant’s personal guarantees to those banks have not been confirmed by those banks. No affidavits emanating from those banks were produced for scrutiny of this court. At the end of the day, the authenticity of Schedule “A” remains to be tested. I have more to say of this later. Suffice for me to say that there are inherent weaknesses in Schedule “A”.

- a* By way of a rebuttal, the plaintiff affirms an affidavit in reply through Amy Gan Mi Mi (“Amy Gan”), the Vice President of the Execution Creditor’s Special Asset Management Unit. That affidavit in reply was affirmed on 15 June 2004 and it can be seen in encl. 31. In that affidavit in reply, Amy Gan deposes that she affirms the affidavit for and on behalf of the execution creditor
- b* – referring to the plaintiff. She states that the facts and the matters deposed by her are true and within her personal knowledge, information and belief. She avers that she has access to the records and documents of the plaintiff – the execution creditor. She alludes to the defendant’s affidavit in encl. 19 and she endeavours to reply accordingly.
- c* In regard to the averment by the defendant in encl. 19 wherein the defendant reserves his right to raise any preliminary objections at the hearing of the stay application, she categorically states by way of a reply that the defendant has failed to condescend to particulars. She has been advised by her solicitors and she verily believes that there is no cause for the defendant to raise any
- d* preliminary objections.
- She states categorically that the special circumstances alluded to by the defendant in his affidavit in encl. 19 do not constitute special circumstances which would warrant a stay. She then deposes the following salient facts:
- e* (1) that on 19 February 2002, the plaintiff obtained the summary judgment against the defendant and the latter’s appeal to the judge in chambers was dismissed by the learned judge on 27 February 2003;
- (2) on 14 June 2002, the learned senior assistant registrar dismissed the defendant’s application for a stay of execution of the summary judgment
- f* and there was no appeal against such refusal to the judge in chambers;
- (3) on 9 December 2003, the defendant filed yet another application for a stay of the summary judgment and the learned judge dismissed it forthwith on 15 April 2004;
- g* (4) that on two separate occasions as alluded to above – on 14 June 2003 and on 15 April 2004, the defendant had shown no basis for the stay of execution of the summary judgment;
- (5) the present application in encl. 29 constitutes the defendant’s third attempt to obtain a stay *albeit* it is in the nature of a stay of the writ of seizure
- h* and sale and it ought not to be granted;
- (6) on the issue that the summary judgment is a nullity as raised by the defendant, Amy Gan has been advised by her solicitors and she verily believes that it is misconceived in law and in fact for the defendant to raise the issue of nullity; and she states that the BLR is a fluctuating rate
- i* and the changes to the BLR is a public knowledge and that it may be

- obtained at any time from the plaintiff; and she further states that the defendant is at liberty to make enquiries with the plaintiff as to the amount of interest to be paid in order to avoid enforcement proceedings; *a*
- (7) in regard to the defendant's allegations that the writ of seizure and sale is *mala fide* and an abuse of the process of the court, Amy Gan vigorously denied that it was so; and she states that although the plaintiff had commenced bankruptcy proceedings against the defendant, the plaintiff had found it to be immensely difficult to effect service of the bankruptcy notice and the creditors petition on the defendant; *b*
- (8) that the plaintiff's solicitors had, on various occasions, made attempts to serve the creditor's petition on the defendant personally but was unsuccessful and so, the plaintiff applied and obtained an order for substituted service of the creditor's petition on 12 April 2004 and until today the creditor's petition has yet to be heard; and *c*
- (9) that the writ of seizure and sale is the effective way for the plaintiff to reap the fruits of the summary judgment and that there is no law barring the plaintiff from taking such a course of action. *d*

Indeed, under the writ of seizure and sale it is the onerous duty of the sheriff to seize and sell any property which he has power to seize. Such seizure and sale should reasonably be sufficient to satisfy the judgment debt and interest and the expenses of the sheriff himself (*Watson v. Murray & Co* [1955] 2 QB 1, [1955] 1 All ER 350; *Pitcher v. King* [1844] Dav & Mer 585; *Aldred v. Constable* [1844] 6 QB 370; and *Gawler v. Chaplin* [1848] 2 Exch 503). The plaintiff stands to gain when the sheriff takes action under the writ of seizure and sale. The fruits of the plaintiff's summary judgment would be tasted by the plaintiff to the envy of the defendant. *e*

It is the sheriff's duty under the writ of seizure and sale to ascertain where the defendant's goods are and to seize them forthwith. For this very purpose, the sheriff is entitled to legally enter the dwelling house and premises of the defendant (*Semayne's case* [1604] 5 Co Rep 91 a; and *Kerbey v. Denby* [1836] IM & W 336) and the sheriff too is legally authorised to enter the premises of the defendant's personal representative irrespective of whether the defendant's goods are there because the sole aim of entry is to ascertain the whereabouts of the defendant's goods (*Cooke v. Birt* [1814] 5 Taunt 765 at 770). The sheriff too may even legally enter the premises of a stranger whose premises the defendant's property has been removed to (*Biscop v. White* [1600] Cro Eliz 759). But there is a caveat for the sheriff to take cognizance of: he must not gain entry by force against the will of the defendant – the judgment debtor or that stranger for that matter (*Vaughan v. McKenzie* [1969] 1 QB 557, [1968] 1 All ER 1154, DC; and *Southam v. Smout* [1964] 1 QB 308, [1963] 3 All ER 104, CA). And once an entry has been effected, the sheriff may act in *g*

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- a* this way: the doors of all rooms, cupboards or trunks may be broken open in order to legally complete the execution (*R v. Bird* [1679] 2 Show 87; *Ratcliffe v. Burton* [1802] 3 Bos & P 223; *Lee v. Gansel* [1774] 1 Cowp 1; and *Lloyd v. Sandilands* [1818] 8 Taunt 250). There is no necessity for the sheriff to demand that the inner doors, cupboards or trunks be opened before the breaking
- b* (*Hutchison v. Birch* [1812] 4 Taunt 619); but it is always courteous to do so. It must always be borne in mind that the sheriff is only doing his job and he is there to enforce the order or judgment of the court. Prudence and commonsense must prevail.

- c* Amy Gan continues to say as follows. That it is absurd for the plaintiff to be prevented from enforcing the summary judgment against the defendant solely because of the latter's averment in regard to his inability to pay the judgment sum. She avers that the defendant is gainfully employed as the director of the Tirathrai Group of Companies and that the defendant still receives income from his employment. She avers that the defendant's standard of living is high judging
- d* from the address and the state of his residence. Incidentally the house address of the defendant is at number 10, Jalan Titiwangsa, 53200 Kuala Lumpur.

- Amy Gan further avers that the defendant had, time and again, thwarted the plaintiff's attempts in enforcing the summary judgment. She avers that the defendant, on the one hand, asserts that he is unable to pay the judgment sum and had committed an act of bankruptcy while, on the other hand, the defendant challenges the validity of the summary judgment and seeks to avoid service of the creditor's petition. According to Amy Gan, the defendant has no intention of settling the debt, and so the plaintiff is compelled to execute the summary judgment. For all these reasons, Amy Gan seeks this court's indulgence to
- e* dismiss the stay application in encl. 29 with costs to be paid forthwith. The deputy registrar dismissed encl. 29 with costs and the defendant, as I said earlier, now appeals to the judge in chambers in encl. 32.
- f*

I pause here for a moment to take stock of the situation. I must proceed further.

g **Enclosure 32 Is An Abuse Of The Process Of The Court – So Says The Plaintiff**

As I see it, the chronology of events may be stated in this way:

- (a) 19 February 2002 – the summary judgment entered by the learned senior assistant registrar against the defendant.
- h* (b) 14 June 2002 – the defendant's application in encl. 12 for stay of execution of the summary judgment was dismissed by the learned senior assistant registrar and, as I said earlier, there was no appeal against such refusal to the judge in chambers.
- i* (c) 7 January 2003 – the plaintiff filed the bankruptcy notice against the defendant.

- (d) 27 February 2003 – the defendant’s appeal to the judge in chambers in respect of the summary judgment was dismissed with costs. *a*
- (e) 31 July 2003 – the creditor’s petition presented against the defendant.
- (f) 22 December 2003 – the plaintiff issued the writ of seizure and sale against the defendant. *b*
- (g) 22 December 2003 – a restraining order obtained by the Tirathrai Group of Companies which restrained, inter alia, proceedings against the defendant in his capacity as the director.
- (h) 18 March 2004 – the restraining order set aside by the court on the application of the plaintiff. *c*
- (i) 15 April 2004 – the defendant’s fresh application in encl. 21A for a further stay of execution of the summary judgment to the judge in chambers was dismissed with costs.
- (j) 11 June 2004 – the notice to oppose the creditor’s petition was served on the plaintiff’s solicitors. *d*
- (k) 16 June 2004 – the defendant’s application in encl. 29 for stay of the writ of seizure and sale was dismissed with costs.
- (l) 21 June 2004 – the auction sale fixed for the sale of the goods seized under the writ of seizure and sale. *e*
- (m) 22 June 2004 – the hearing of the creditor’s petition.

From the chronology of events, it is apparent that encl. 32 represents the defendant’s fifth attempt to prevent the plaintiff from executing the summary judgment. The writ of seizure and sale is all encompassing. It allows execution to be levied against either the movable or immovable property of the judgment debtor – referring, of course to the defendant. The repeated attempts by the defendant to prevent execution of the summary judgment represent a clear abuse of the process of the court and this court is entitled to exercise its inherent powers under O. 92 r. 4 of the RHC to disregard and strike out encl. 32 forthwith. I would agree with the plaintiff that encl. 32 constitutes an abuse of the process of the court. *f*

An abuse of process of the court can never be tolerated. The courts have held in the past that the following acts of abuse of process have been held to be punishable as contempts: *g*

- (1) where the creditor files a double process for the same debt (*Higgins v. Sommerland* [1614] 2 Bulst 68);
 - (2) where the plaintiff serves an imitation writ to frighten the defendant (*Re Banks* [1845] 4 LTOS 375); *h*
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- a* (3) where there is a fraudulent collusion between the plaintiff and the defendant in order to defend the rights of a third party (*M'Gregor v. Barrett* [1848] 6 CB 262);
- (4) where the plaintiff issues execution and seizes the defendant's goods on the same day as the defendant obtains a decree nisi to deprive the plaintiff of his costs (*Pitcher v. Nokes* [1848] 12 JPJo 473);
- b* (5) where money is paid by way of a consideration for the withdrawal of a motion to commit for contempt (*R v. Newton* [1903] 67 JP 453);
- (6) where the party falsely pleading infancy in order to delay the trial (*Lord v. Thornton* [1614] 2 Bulst 67);
- c* (7) where the party makes a false oath in order to obtain bail (*Royson's case* [1628] Cro Car 146); and
- (8) where the party who seeks the court's exercise of discretion in a divorce proceeding makes a false statement (*Apted v. Apted and Bliss* [1930] P 246).
- d* The list can never be exhaustive. And when there is an abuse of the process of the court, the court has the inherent power to act accordingly. Thus, when a subpoena has been issued in abuse of the process of the court, the court has the power to set it aside (*Farulli v. Farulli and Pederzoli* [1917] P 28).
- e* Likewise here, the repeated attempts by the defendant to prevent execution of the summary judgment must be construed as an abuse of the process of the court. The writ of seizure and sale should proceed in an orderly fashion and it should not be stayed at all.

Are There Grounds To Support A Stay Of Execution?

- f* I would answer this question in the negative. I will now refer to some authorities. In *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1, the Federal Court speaking through Augustine Paul JCA said at p. 17 of the report:
- g* [23] The onus is on the applicants to demonstrate the existence of special circumstances to justify the grant of a stay of execution. The reasons must relate to the enforcement of the judgment. They must be deposed in the affidavit filed in support of the application (see *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406).
- And Abdul Hamid Mohamad JCA (now FCJ) in *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380 said:
- h* The approach taken by most judges appears to be that a successful litigant should not be deprived of the fruits of a judgment obtained in his favour, unless there are special circumstances (or special grounds) that justify a stay of execution to be granted. The weight of authorities appears to me to say
- i* that the special circumstances must be special, not ordinary, common or usual circumstances and that go to the execution of the judgment and not to the validity or correctness of the judgment (or merits of the appeal).

In *T.C. Trustees Ltd. And Another v. J.S. Darwen (Successors) Ltd.* [1969] 2 QB 295, the English Court of Appeal with a coram of Lord Denning MR, Lord Diplock and Winn LJ considered O. 47 r. 1 of the English Rules of the Supreme Court which is equivalent to our very own O. 47 r. 1 of the RHC. And Lord Denning MR writing a separate judgment for the English Court of Appeal aptly said at p. 302 of the report:

Mr. Lipfriend raised a further point. He said that under R.S.C., Ord. 47, r. 1, there is power, in the case of a writ of fi. fa., or elegit, to stay proceedings if there are special circumstances which render it inexpedient to enforce the judgment or in case the applicant is unable from any cause to pay the money. I think that is inappropriate here. The circumstances there again are circumstances which go to the enforcement of the judgment: and not those which go to its validity or correctness.

And flowing from these three cogent authorities, the appropriate question to pose would be this: are there special circumstances which relate to the enforcement of the summary judgment that justify the grant of the stay of execution of the writ of seizure and sale? The answer would be in the negative. Sad to say the defendant's affidavit has failed to state any special circumstances which relate to the enforcement of the summary judgment. The defendant ventured the following reasons for the stay:

- (1) that there is no purpose to the writ of seizure and sale in the light of the bankruptcy proceedings filed against the defendant;
- (2) that the summary judgment is a nullity; and
- (3) that the defendant is unable to pay the money.

I must respond to them vigorously.

It must not be forgotten that the plaintiff as the judgment creditor is entitled to pursue any or all the remedies to recover monies lent by it. This line of approach receives the sanction of the Federal Court in the case of *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 where Gopal Sri Ram JCA (writing for the Federal Court) in clear words said (see p. 56 of the report):

Now, it is trite that a chargee/creditor may pursue any or all remedies to recover monies lent by him. He may enforce his statutory charge against the chargor by way of proceedings in rem under s. 256 of the Code. He may sue the principal debtor (who may or may not be the chargor) upon the personal covenant contained in any loan agreement that was entered into between the parties. He may proceed against the surety who has guaranteed the loan. And he may pursue all of these courses simultaneously, contemporaneously or successively. See *China and South Sea Bank Ltd v. Tan* [1989] 3 All ER 839 at p. 842.

- a* That being the case, the plaintiff is entitled to pursue with the execution of the summary judgment against the defendant under the writ of seizure and sale as well as under the bankruptcy proceedings. In my judgment, there is nothing in law to prohibit the plaintiff from doing so.
- b* It is the stand of the defendant that the plaintiff cannot pursue both the writ of seizure and sale as well as the bankruptcy proceedings for the following reasons:
- (a) that under s. 10(2) of the Bankruptcy Act 1967 the court may, at any time, after presentation of the bankruptcy petition stay any execution or other legal process;
- c*
- (b) that under s. 50(1) of the Bankruptcy Act 1967 all proceeds of sale from the writ of seizure and sale would have to be remitted to the Head of Insolvency in the event a receiving order is made against the defendant and so it is said that the writ of seizure and sale would serve no useful purpose and clearly it illustrates the *mala fide* and an abuse of the process of the court on the part of the plaintiff;
- d*
- (c) that under s. 53(1) of the Bankruptcy Act 1967 any proceeds received by the plaintiff at the auction on 22 June 2004 pursuant to the writ of seizure and sale would be deemed a fraudulent preference; and
- e*
- (d) that the plaintiff is merely seeking to embarrass the defendant by pursuing the writ of seizure and sale because the goods to be auctioned off would not amount to more than RM10,000.
- In response, I have this to say.
- f* That s. 10(2) of the Bankruptcy Act 1967 must be read together with s. 10(1) of the said Act which reads as follows (the relevant parts only):
- The court may, if it thinks it advisable for the protection of the estate, at any time after the presentation of a bankruptcy petition
- g* and so it can be surmised that the power under s. 10(2) of the Bankruptcy Act 1967 is only to be exercised when the court thinks it is advisable to protect the estate of the debtor. But, in the context of the present case, there are no grounds shown by the defendant as to why there is a need to protect the estate of the debtor. At any rate, it is germane to mention that the power under
- h* s. 10(2) of the Bankruptcy Act 1967 is entirely discretionary in nature and it is exercisable by the bankruptcy court and not this court. Section 2 of the Bankruptcy Act 1967 defines the word “court” to mean:
- the court having jurisdiction in bankruptcy under this Act.
- i*

Now, alluding to s. 50(1) of the Bankruptcy Act 1967 it is quite apparent that it operates if and when a receiving order is made against the defendant. But, at this point of time, no bankruptcy order has been made against the defendant. In fact, the defendant is strenuously opposing the bankruptcy proceedings and it is too premature to say that the plaintiff would be able to obtain the adjudication and receiving orders against the defendant. That being the case, the plaintiff is certainly entitled to pursue with the execution against the defendant under the writ of seizure and sale simultaneously with the bankruptcy proceedings. The court in *Lim Sin Oo & Ors v. Cheah Tjeng Siong* [1991] 1 CLJ 726; [1991] 2 CLJ (Rep) 418 was of the view that there was no reason as to why a writ of seizure and sale in respect of the taxed costs cannot be issued after the issuance of the bankruptcy notice. The court too said that s. 50(1) of the Bankruptcy Act 1967 merely provides for the circumstances in which the creditor would be required to hand over the benefit of the execution to the official assignee. The court also held that that section (referring to s. 50(1) of the Bankruptcy Act 1967) does not state whether a writ of seizure and sale can be issued after the commencement of the bankruptcy proceedings.

In *Arab Bank Ltd v. Ng Soo Jin & Ors (Bank of Montreal, Third Party)* [1988] 3 MLJ 250, the High Court of Singapore had occasion to consider the provision of s. 49 of the Singapore's Bankruptcy Act. At p. 257 of the report, Chao Hick Tin JC had this to say:

The appellant has also contended that the charging order should not be made absolute because of s. 49 of the Bankruptcy Act (Cap 20, 1985 Ed). That section relates to the condition under which a creditor who has issued execution against the debtor may or may not retain the benefit of the execution as against the Official Assignee. In my opinion it has no bearing on the question whether the charging order in the present case should be made or whether it should be set aside. All that the section means, in the circumstances of the present case, is that as the plaintiffs have not completed the execution before notice of the commission of an act of bankruptcy by the second defendants, the plaintiffs may not retain the benefit of the execution: see *Re a Debtor* [1977] 3 All ER 489. The fact of non-completion of execution of the charging order cannot per se render the making of that order bad. The net result of the section is that the benefit of the charging order will have to be distributed among all the unsecured creditors of the second defendant.

In Malaysia, we have s. 50 of the Bankruptcy Act 1967. In so far as the Official Assignee is concerned, he needs only to rely on s. 50(1) of the Bankruptcy Act 1967, which reads as follows:

Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due, or property belonging to him, he shall not be entitled to retain the benefit of the execution or attachment against the Official Assignee unless he has completed the execution or attachment before the date

- a* of the receiving order and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.

- The official assignee should then refer to s. 50(2)(b) of the Bankruptcy Act 1967 which says that “an attachment of a debt is completed by receipt of the debt.” It must be borne in mind that the words “before notice” appearing in s. 50(1) of the Bankruptcy Act 1967 must be read conjunctively and it should refer to the events of both the presentation of the bankruptcy petition and the commission of an act of bankruptcy. The failure on the part of the attaching creditor to satisfy both or any one of them will not entitle him to retain the benefit of the attachment against the official assignee.

- I say that the defendant is merely seeking for time to delay the inevitable. It is a foregone conclusion. Even if the writ of seizure and sale is stayed, which would not be the case here, once the defendant is adjudicated a bankrupt the Head of Insolvency would be disposing off the assets of the defendant slowly but surely. It would be an excruciating experience for the defendant. What a pity!

- In regard to s. 53(1) of the Bankruptcy Act 1967, I say that it is not applicable here. I say that the fraudulent preference contemplated under this provision is one made by the debtor himself. Here, the proceedings of attachment and sale are made vigorously by the creditor and the court. It must also be borne in mind that:

- (i) the defendant has not been adjudicated a bankrupt;
- (ii) there has not been any conveyance or transfer of property to the plaintiff by the defendant;
- (iii) there is no judicial proceedings taken or suffered by any person unable to pay the defendant’s debt; and
- (iv) the creditor’s petition against the defendant was presented on 31 July 2003 and to be caught within the ambit of s. 53(1) of the Bankruptcy Act 1967, any conveyance, transfer etc has to occur six (6) months before 31 July 2003 and it must be recalled to mind that the writ of seizure and sale was filed on 22 December 2003 almost five (5) months after the filing of the creditor’s petition.

- Even if there is a fraudulent preference to the plaintiff, it is a matter that falls within the purview of the Head of Insolvency as to whether it should be prosecuted under s. 115 of the Bankruptcy Act 1967. At the end of the day, the position of the defendant is certainly bad. The stay should not be granted.

- On the issue of embarrassment, the stand of the plaintiff is that it is not seeking to embarrass the defendant at all. It is the stand of the plaintiff that it is merely exercising its right as a judgment creditor to enforce the summary judgment in

order to recover the sums owed by the defendant to the plaintiff. The legal right of the plaintiff to pursue with the writ of seizure and sale should not be read as an attempt to embarrass or humiliate the defendant. It is just another process of the law on execution. To execute is to enforce or give effect to the judgment or an order of the court of law. Lord Denning MR after citing the definition of “execution” from *Termes de la Ley* and the dictum of Kekewich J in *Blackman v. Fysh* [1892] 3 Ch 209 at 217, CA aptly said in the case of *Re Overseas Aviation Engineering (GB) Ltd* [1963] Ch 24 at 39, 40, [1962] 3 All ER 12 at 16:

‘Execution’ means, quite simply, the process for enforcing or giving effect to the judgment of the court ... In cases when execution was had by means of a common law writ, such as *fieri facias* or *elegit*, it was legal execution; when it was had by means of an equitable remedy, such as the appointment of a receiver, then it was equitable execution. In either case it was ‘execution’ because it was the process for enforcing or giving effect to the judgment of the court.

The current sum outstanding from the defendant under the summary judgment is RM3,379,059.29 as at 7 June 2004. It is a colossal sum. The proceeds of the auction sale would go towards the immediate reduction of the sum outstanding from the defendant. The plaintiff disputes the allegation by the defendant that the proceeds from the auction would only fetch a minimal sum of RM10,000. According to the plaintiff, the movables itemised for auction include antique chandeliers and priceless porcelain, among others. I merely take note of these facts. Only after the auction sale can one determine the outcome of that sale.

In regard to the averment that the summary judgment is a nullity, I have this to say. The summary judgment is a valid and an enforceable judgment. Its validity, at this juncture, is beyond dispute.

To say that the summary judgment is a nullity as the BLR is not stated is to overlook the fact that the BLR cannot be fixed and that it fluctuates on a regular basis. This court certainly can take judicial notice that BLR fluctuates from time to time. It is the banking practices of the country and everyone knows that.

In regard to the averment that the defendant is unable to pay, reference to O. 47 r. 1(3) of the RHC should be made. That order expressly requires that there must be evidence to substantiate the defendant’s claim of an inability to pay. The defendant miserably failed to exhibit any supporting documents to show that he is a man of straw. Schedule “A” as alluded to earlier is insufficient. The defendant merely made bare statements in regard to:

- a* (a) his employment income without disclosing his other sources of income;

(b) his liability as a guarantor to several financial institutions without advancing proofs that his guarantees are still subsisting and have not been discharged by the respective financial institutions; and
- b* (c) his debt to various financial institutions without verifications from the respective financial institutions in regard to the amounts claimed.

c George Bernard Shaw once said in “Major Barbara, Preface” that “the greatest of evils and the worst of crimes is poverty”. Is the defendant that poor as he made himself out to be? It must be borne in mind that no banks in Malaysia would accept the defendant’s personal guarantee if he is a man of straw. I really wonder whether the defendant really stood as personal guarantors to those banks. In the absence of supporting affidavits from those banks, Schedule “A” remains a mere averment devoid of any weight at all.

d There is a passage appearing in the judgment of Abdul Malek bin Ahmad J (as he then was) in *YK Fung Securities Sdn Bhd v. Ronald Yeoh Kheng Hian* [1989] 2 CLJ 1284; [1989] 2 CLJ (Rep) 664 that merits reproduction. It is this:

e Here, however, one cannot actually say, apart from the averments of the defendant, that the plaintiff was in a state of poverty even if it used the judgment sum obtained here to pay off its other liabilities. Between the two parties, it is obvious that the plaintiff is, economically speaking, the stronger of the two. As for the stay of the writ of seizure and sale, the defendant had not even complied with the requirement under O. 47 r. 1(3) of the Rules of the High Court 1980 in not stating his present income, as he had stated that he is now a city councilor, and his assets and liabilities in full.

f As a stay is a matter of discretion and as in this case I am of the view that the defendant had not shown any special circumstances to warrant a stay, suggesting a court deposit of \$3,000 for an appeal where the judgment sum is \$607,347.76 can hardly be said to be a substantial guarantee should the defendant fail in his appeal. In consequence, I had dismissed the defendant’s application for stay pending appeal and the stay of execution of the writ of seizure and sale with costs.

g

The house address of the defendant as alluded to somewhere in this judgment is located in a good locality within the precinct of Kuala Lumpur. It is a good area and so he cannot be said to be living in a state of poverty.

h

By way of an alternative in encl. 29, the defendant seeks to strike out the writ of seizure and sale. But, unfortunately, no grounds have been advanced by the defendant for his alternative prayer and, at any rate, no grounds exist to justify the striking out of the writ of seizure and sale.

i